IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7612 OF 2003

1) Shri Mithalal Bhikamdas Oswal

1-A) Smt. Sayerbai Mithalal Oswal

1-B) Shri Prakash Mithalal Oswal

1-C) Shri Kantilal Mithalal Oswal

1-D) Shri Raju Mithalal Oswal

2) Shri Viraj Bhikamchand Oswal

3) Shri Prithviraj Bhikamchand Oswal

4) Shri Anilkumar Sohanraj Oswal

5) Smt. Kalavati Sohanraj Oswal

6) Smt. Jatanbai Bastimal Lodha (since deceased)

7) Smt. Panasaibai Mohanraj Jain

8) Smt. Dhakabai Sampatraj Kawad **... Petitioners**

Versus

1) Shri Jahangir Nasserwanji Dhanjisha

1-A) Smt. Perinbai Jehangarji Dhanjisha

1-B) Shri Nousher Jehangirji Dhanjisha

1-C) Smt. Colly Sheeb Latif

2) Shri Temulji Nasserwanji Dhanjisha **... Respondents**

Mr. Vijay Killedar and Mr. Nitin Jamdar for Petitioner

Mr. V.A. Thorat, Sr. Adv.i/b. M/s. Haresh Joshi and Co. for Respondent-1(C).

CORAM : S.R. SATHE, J.

DATED : 22/06/2006.

JUDGEMENT :-

1. As per order passed by this Court on 28-11-2003 the petition is heard finally at the admission stage.

2. Petitioners have filed this writ petition under Article 227 of the Constitution of India challenging the order passed by the Joint Civil Judge, J.D., Pune in Misc. Application No.731 of 2000 whereby he rejected the application filed by the present Petitioners under Section 151 of Code of Civil Procedure for restoration of the Civil Suit No.1018 of 1958.

3. The brief facts giving rise to the present petition are as under :

. The writ petition pertains to the bungalow no.2 Elphinston Road, Pune. Initially the said property was owned by Nuserwanjee Dhunjishah. The said Nuserwanjee Dhunjishah died leaving behind :

a) Bamanji Nasarwanji Dhenjisha
b) Ms Ratanbai Naswarwanji Dhanjisha
c) Manikbai Cawasji Bahadurji

d) Jahngir Nasarwanji Dhanjisha, and

e) Tamuilji Nasarwanji Dhanjisha.

. One Madanraj Oswal had filed Civil Suit No.190 of 1949 in the Court of Civil Judge, J.D., Pune for recovery of money lend by him to Jehangir Nasarwanji. the said suit was decreed in his favour and he filed Darkhast No.263 of 1956. The interest of Jahangir Nasarwanji in the above suit property was vested with Madanraj Oswal, decree holder and he obtained sale certificate. The said decree holder's right were assigned to Shri Bikamchand Harakji.

4. In the above mentioned Darkhast possession warrant was issued and symbolic possession was taken on 17-4-1962. The application made for possession was dismissed by the Civil Judge, J.D., Pune on 7-1-1964 holding that the proper remedy of the Petitioner was to file a suit for partition of the property. Being aggrieved by that order Bikamchand Harakji, assignee of the original holder filed First Appeal No.396 of 1964 in the High Court. Second Appeal No.543 of 1967 with Second Appeal No.592 of 1967 were also filed in the High Court.

5. In fact Bamanji Nasarwanji and Ratanbai Nasarwanji Dhanjisha had filed Regular Civil Suit No.1018 of 1958 against Himatlal Pratapmal and Co, Jahangirji N.

Dhanjisha, Manikbai Cawasji Bahadurji and Temulji Nasarwanji Dhanjisha and Bikamchand Harakji for declaration that the order passed in Misc. Application No.465 of 1957 regarding the suit property are illegal and the auction that had taken place in Special Darkhast NO.263 of 1956 is not binding on plaintiffs. The said suit was decreed in plaintiff's favour and it was held that the order in Misc. Application No.465 of 1957 dated 18-10-1957 was illegal and auction that had taken place was not binding on 3/4th joint share of the plaintiff. Consequently, injunction was also issued against defendant nos 1 to 4 in that suit.

6. Being aggrieved by the said order the original defendant no.4 Bhikamchand Nakraji filed Civil Appeal No.229 of 1996. The said appeal was partly allowed and the matter was remanded to the lower Court with directions that the decree be drawn in respect of shares of those plaintiffs for whom letters of administration are produced.

7. Being aggrieved by the said order two appeals were filed bearing Second Appeal No.543 of 1967 and Second Appeal No.592 of 1967. In the above mentioned three appeals viz. First Appeal No.396 of 1964, Second Appeal No.543 of 1967 and Second Appeal No.592 of 1967, the Court by consent, set aside the decree passed by the trial Court below and passed a decree in terms of

compromise as mentioned in the consent terms. The said consent terms are as follows :-

1. Agreed and declared that the appellant (original defendant no.4) is the owner of one half equal undivided share in suit property being bungalow no.12 at Elphinstone Road, Poona Cantonment.

2. Agreed and declared that respondent no.1 (original defendant no.2) is equally the owner of the remaining undivided one equal half share in the suit property being Bungalow no.12 at Elphinstone Road, Poona Cantonment.

3. Agreed that towards partition of the above suit property between the appellant and respondent no.1 auction by binding should be held on or before June 15, 1968, before Mr.S.L.Mehta who is appointed Receiver of the suit property by consent of parties. The party giving the higher shall pay the price payable by him (being one half of the total value of the bid) to the other party by depositing the same with the Receiver on or before November 15, 1968, time being of essence and not liable to be extended. If the party giving the higher bid makes default in depositing the above referred amount to become the owner of the suit property upon making deposit of

the sum equal to one half of the bid given by him as the total value of the property one or before February 15, 1969. The other party will not have any option and will be liable to make such payment and complete purchase of the suit property in his favour by making the above payment. The trial Court will be entitled to give all necessary directions and pass executable orders for completion of the sale and possession in favour of the party becoming entitled to execution of a deed of sale on usual terms and the same will be executed within two months of the date of the deposit fixed above. There will be decreetal charge in favour of the party who becomes seller of the suit property for securing payment of the price due to it. Costs of stamp and registration will be borne equally.

4. Agreed that the Respondent will indemnify the appellant in respect of claims, if any, made by his brothers and sisters and their heirs.

5. Agreed that respondent no.3 (original defendant no. 2) is liable to pay mesne profits to the appellant as owner of one fourth for the period 4-3-1959 to 31-12-1961 and a owner of one half from 1-1-1962 till the completion of the sale.

6. Agreed that the mesne profit will be decided by

Mr.S.L.Mehta (being the Receiver) as a Commissioner appointed by the trial Court. The Commissioner shall proceed to decide the question of mesne profits of the suit property (including the bungalow) forthwith and make his report on or before October 15, 1968, to the trial Court. The trial Court will pass decree for and give directions for payment of the mesne profits and will be entitled to execute the decree in respect of mesne profits if the amount is not paid within the time fixed by the trial Court. In the event of the appellant becoming purchase, he will be entitled to a set off in respect of the amount ascertained to be the mesne profits.

7. In view of the above consent terms, the appellant agrees that he has no claim under the auction sale held on October 14, 1959, in Regular Darkhast No.290 of 1958. The appellant shall withdraw C.Application No.102 of 1966 pending in the court of the Joint Civil Judge (Senior Division) Poona.

8. Without prejudice to all his contentions, the appellant agrees that the Receiver may pay Rs.100/- per month to the Respondent 1 beginning with May 1, 1968. The Respondent 1 will be accountable for this amount to the appellant on the footing of the

parties being owners of one equal half in the final accounts between the parties. In respect o the outstanding balance due by the Respondent 1 on accounts being taken, appropriate decree and orders will be passed by the trial Court. Liberty to apply.

9. No order as to costs of the Appeals."

8. From the above mentioned compromise decree it is very clear that Shri Mehta Advocate was directed to hold auction of the suit property on or before 15-6-1968. It is averred in the present petition that record and proceedings of the said case was lost and ultimately the record was reconstructed as per order by the District Court. Thereafter the present Petitioners moved the trial Court for giving directions to the Commissioner to auction the suit property. Thereafter on 21-1-1993 Commissioner even issued notice to the parties. However, no auction took place. In the meantime some of the plaintiffs and defendants died. Then again on 18-9-1998 Receiver was directed to conduct the auction before 27-10-1998. Being aggrieved by the said order Smt.K.S.Latif filed review application on 18-9-1998. So, again auction did not take place. However, ultimately the said review application was withdrawn and as such on 13-9-2000 the learned 3rd Joint Civil Judge, J.D., Pune disposed of the said suit by observing that

both the parties failed to follow the directions issued by the Hon'ble High Court and they are not interested in the said directions, heirs of deceased plaintiff have not been brought on record and as a result of the same there is no point in keeping the suit pending.

9. Being aggrieved by the said order of disposal of the suit the present Petitioners filed Misc. Application No.731 of 2000 under Section 151 of Code of Civil Procedure and submitted that there were no latches on the part of the said applicants. The Commissioner in fact did not work as per directions of the High Court and as a result of non holding of the auction the applicants have suffered loss of about 50 lacs. According to the applicants the Court should not have disposed of the suit as the same was already decreed.The applicant therefore submitted that the order dated 13-9-2000 be recalled and the suit be restored to file and steps be taken as per directions of the Hon'ble High Court passed in compromise decree.

10. The said application was strongly opposed by the opponent no.1 Smt.Colly Sheeb Latif. She contended that the application under Section 151 of Code of Civil Procedure is not maintainable and only remedy available to the applicants was to file appeal or revision as the directions of the High Court were not followed the suit did not survive and was in fact liable to be dismissed

30 years back. The High Court had already passed the decree in the year 1968 itself and no purpose left in the suit and as such the only remedy for the applicant was to approach the High Court for extension of time. Hence on all these grounds the opponent prayed for dismissal of the application.

11. After hearing both the learned Advocates the learned trial Judge came to the conclusion that the application under Section 151 of Code of Civil Procedure is tenable but as both the parties were at the fault in obeying the directions given by the Hon'ble High Court no relief under Section 151 of C.P.C. can be granted in favour of the party whose conduct is full of latches. He therefore rejected the said application.

12. Being aggrieved by the same the applicants filed resent writ petition. In this petition before me Shri Jamdar, learned Advocate for the Petitioners submitted that order regarding disposal of the suit is passed behind the back of the present Petitioners and as a result of dismissal of the suit the Petitioners are put to loss. The learned trial Judge in fact should have issued directions to the Commissioner for holding auction as the Court in which proceedings were pending was having a right to extend the said time. He therefore submitted that petition be allowed, the order passed by the learned trial Judge rejecting Petitioner's

application be set aside and the original civil Suit NO.1018 of 1958 be restored and the time for holding auction be extended and necessary directions be given to the Commissioner. As against this, Shri Thorat, learned senior Counsel submitted that present petition is misconceived. In fact the application under Section 151 of C.P.C. was also misconceived. As the suit was already disposed of there was no question of granting any relief by the trial Court under Section 151 of CPC. He also submitted that by this petition the Petitioners are in fact seeking relief of extension of time for holding auction. But admittedly no such relief was sought by the present Petitioners till this time and naturally as such the relief as claimed cannot be granted.

13. It is not in dispute that consent terms were produced in F.A.No.396 of 1964, 543 of 1967 and 592 of 1967 by the parties and all the above mentioned 3 proceedings were decided by the Court consequent to the said consent terms. It is true that as per the said consent terms the Commissioner Shri Mehta Advocate was directed to hold auction or before 15-6-1968 and certain further directions were also given to the parties and how the auction should take place and what would happen if particular party fails to deposit the amount etc. It is also an admitted fact that as per the said consent terms till today the Commissioner has not held the

auction. In fact, it is also an admitted position that after expiry of the said period during which the auction was to be held the parties should moved the High Court for getting the period of auction extended. On the contrary we find that the parties moved the trial Court in that behalf and the trial Court surprisingly gave certain directions. Not only that but during this period the parties also moved the trial Court for bringing heirs of deceased defendant on record and the trial Court also passed certain orders in that behalf.

14. It is true that by virtue of the order dated 13-9-2000 the trial Court disposed of the suit. Naturally, the question arises whether in fact on that day the suit was pending. It is an admitted fact that the said suit was initially decreed by the trial Court and against that the appeal was preferred and decision of the appellate court was also then challenged in the High Court. Not only that but ultimately F.A.No.396 of 964, S.A.No.543 of 1967 and S.A. No.592/67 were decided and compromise decree was passed in the same. If we see the said decree it is clearly mentioned therein that :

> "The Court by consent set aside the decrees passed by the trial court below and passed a decree in terms of compromise mentioned above".

15. So, from the above sentence it is also clear that earlier orders passed by the lower courts merged into the order passed by the High Court. There is nothing in the said compromise decree which would indicate that this Court had kept the said suit No.1018 of 1958 alive, though certain steps were to be taken or orders were to be passed by the trial Court as per directions given in the above mentioned compromise decree. All those steps were to be taken only on the parties preforming or not performing as per directions of the High Court. So, whatever was to be done by the trial Court was in the nature of executing the directions of the High Court. That does not mean that Suit No.1018 of 1958 was not disposed of and learned trial Court was competent to dispose of the same as has been done by it. However, unfortunately it appears that both the parties to the suit misread the compromise decree. Steps taken by them before the trial Court after passing of the above mentioned compromise decree by the High Court were certainly misconceived. So, under such circumstances when the suit itself was not pending the order dated 13/09/2000 was certainly uncalled for and it was redundant.

16. The order dated 13-9-2000 passed by the Court amounts to dismissal of the said suit. Whatever order that was passed by the ld. trial court on 13/09/2000,

at the most, could have been challenged in the higher court by way of appeal or by Writ Petition.

17. However, in the present petition the petitioners are in fact asking for restoration of the suit and extension of time for holding auction. This can not be done in the present petition. The order that was passed on 13/09/2000 can not be rectified in an application filed under section 151 of CPC. It is needless to say that powers and jurisdiction under section 151 of CPC is to be exercised by the Court in very exceptional circumstances for which Code provides no procedure. So considering these aspects also the petitioner's application under section 151 of CPC was misconceived. So, ultimately the trial court rightly rejected it and refused to restore the suit.

18. It is also submitted on behalf of the petitioners that now they have in fact moved this Court in the previous second appeal proceedings for extension of time to hold auction. As I have already held that on 13/09/2000 regular civil suit No. 1018/1958 was in fact not pending before the trial court, the question of restoring it and setting aside the order of the trial court passed on that day does not arise. Naturally, the present writ petition has to be rejected. Hence, the present writ petition is rejected in the above terms.

(S.R.SATHE,J)